

**COOPERATIVE AGREEMENT BETWEEN U.S. FISH AND WILDLIFE  
SERVICE, NATIONAL MARINE FISHERIES SERVICE, AND  
STATE OF IDAHO**

**1.0 PARTIES**

The parties to this Cooperative Agreement (“Agreement”) are the Idaho Department of Lands (IDL); Idaho Department of Fish and Game; Idaho Office of Species Conservation; the United States Fish and Wildlife Service (FWS); and the National Marine Fisheries Service (NOAA Fisheries Service). In this Agreement, FWS and the NOAA Fisheries Service are collectively referred to as the “Services” and the State agencies are collectively referred to as the “State of Idaho” or simply “the State.”

**2.0 RECITALS AND PURPOSES**

**2.1 Recitals.** The parties have entered into this Agreement in consideration of the following facts:

**2.1.1** The Clearwater and Salmon basins are located in central Idaho and are tributary to the Snake River. Together, these two basins encompass 14.9 million acres of land, or 28 percent of the State. Approximately 66 percent of the Clearwater basin and 87 percent of the Salmon basin are federally owned. State and private forestlands constitute 23 percent of the land area in the Clearwater basin, and 1.1 percent of the land in the Salmon basin. Over 30,000 miles of streams in the basins support fish species and their habitat. This land is described more fully in section \_\_ of Appendix B.

**2.1.2** The State and the Services are interested in participating in a Cooperative Agreement to conserve resident and listed fish species in the Salmon and Clearwater River basins. To this end, they have developed the Idaho Forestry Program for the Salmon and Clearwater River basins (Idaho Forestry Program), which is designed to improve habitat quality where it may currently be degraded due to historical actions, and to maintain currently existing high quality instream habitat for Listed Fish Species. The Idaho Forestry Program is described in Section II.B.2 of the Term Sheet, which is attached hereto as Appendix A, and the Program Document, which is attached hereto as Appendix B.

**2.1.3** The Congress of the United States has found that there are resident species of fish, wildlife, and plants which are in danger of extinction and that these species of fish, wildlife, and plants are of aesthetic, ecological, educational, scientific, economic, and other value to the Nation and its people. Several of these species resident in Idaho are listed as threatened or endangered under the Endangered Species Act, as amended (16 U.S.C. §§ 1531-43) (ESA). Conservation of these species and their habitat on non-federal lands is important for the long-term survival of many of these species. The State and the Services have technical personnel and various regulatory authorities

to work cooperatively with non-federal landowners to enhance conservation of resident and listed species.

- 2.1.4** The purposes of the ESA are to provide a means whereby the ecosystems upon which endangered and threatened fish, wildlife, and plants depend may be conserved, to provide a program for the conservation of such species, and to take such steps as may be appropriate to achieve the purposes of the various treaties and conventions related to the conservation of fish, wildlife, and plants.
- 2.1.5** The Congress of the United States has declared that encouraging the States and other interested parties to develop and maintain conservation programs which meet national and international standards as expressed in the ESA is a key to meeting the Nation's international commitments and to better safeguard, for the benefit of all citizens, the Nation's heritage in its fish.
- 2.1.6** The Secretary of the Interior has delegated his/her responsibilities under the Act to the FWS. The Secretary of Commerce has delegated his/her responsibilities under the Act to NOAA Fisheries Service.
- 2.1.7** The State of Idaho, the United States, and other parties entered into a Mediator's Term Sheet defining the terms for settlement of water rights litigation regarding the instream flow claims filed by the Nez Perce Tribe and the United States on behalf of the Tribe. That settlement agreement was approved by the United States in Section 4 of the Snake River Water Rights Act of 2004, Public Law 108-447, Division J, Title X. Sections 2 and 9 of the Act provided authorization for funding Section 6 cooperative agreements with the State, including this Cooperative Agreement addressing the Idaho Forestry Program. Section II.B.2 of the Term Sheet requires the parties to negotiate a Section 6 Agreement that incorporates, without material variation, the terms provided in the Term Sheet.
- 2.1.8** The Idaho Forestry Program approved in this Agreement is designed to assist in the conservation of resident endangered and threatened fish. It is the mutual desire of the State and the Services to work cooperatively in planning, developing, and conducting this program to conserve populations of Listed Fish Species.
- 2.1.9** The Director of the FWS has the statutory and administrative responsibility to establish programs for the conservation of endangered and threatened species which are under his/her jurisdiction; to provide periodic review of the State's conservation program at no greater than annual intervals; to provide funding to that program as such funding is available and in accordance with the terms of the ESA; to provide coordination among the programs of the various agencies; and to exchange with the State such biological data or other information which may result in the conservation of endangered and threatened fish.

- 2.1.10** The State has a statutory responsibility to exercise management, protection, control and disposition of the state endowment lands and resources thereon. These lands are to be administered to maximize long-term financial returns to the beneficiary institutions consistent with sound long-term management practices to ensure a healthy, sustainable, productive land base.
- 2.1.11** The State agencies collectively exercise their authorities to conserve endangered and threatened fish which are resident in the State of Idaho. Further, the State agencies (a) have the authority to conduct investigations to determine the status and requirements for conservation of resident fish; (b) have the authority to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered and threatened fish; and (c) have provided for public participation in designating resident fish as endangered and threatened.
- 2.1.12** The Clearwater and Salmon Basins have been determined to be habitat for the federally listed bull trout (*Salvelinus confluentus*), Snake River steelhead (*Oncorhynchus mykiss*), Snake River spring/summer Chinook salmon and Snake River fall Chinook salmon (*Oncorhynchus tshawytscha*), and Snake River sockeye salmon (*Oncorhynchus nerka*). Further, the Clearwater and Salmon Basins have been determined to be habitat for the westslope cutthroat trout (*Oncorhynchus clarki lewisi*) and resident rainbow trout (*Oncorhynchus mykiss*), species of concern. The State, with technical assistance from FWS and NOAA Fisheries Service, has developed a series of measures, described in the Term Sheet and the Program Document, attached as Appendices to this Agreement, to conserve the Listed Fish Species, which, while not specifically directed to the unlisted species of concern, may also have conservation benefits for such unlisted species.
- 2.1.13** Through this Agreement, the State and the United States seek to cooperate in the establishment of a voluntary State program under which non-federal landowners in the Salmon and Clearwater River basins in Idaho may agree to certain additional forest practice measures to further the conservation of aquatic species and their habitat by implementing certain forest practices that supplement those measures set forth in the Idaho Forest Practices Act. These additional measures are designed to provide protection and improvement to fish habitat in the areas affected by the forest lands participating in the State program. The United States, through the Services, intend to assist the State's implementation of the program by providing biological expertise and funding for conservation measures to be implemented through the State's program.

- 2.2 Purposes.** The purposes of this Agreement are:
- 2.2.1** To establish a forestry program for voluntarily-enrolled State lands and private lands within the Clearwater River basin and the Salmon River basin. The IFPSC builds upon existing provisions in the Idaho Forest Practices Act and its implementing regulations to advance the conservation of fish species and their habitats;
  - 2.2.2** To establish the Idaho Forestry Program as an adequate and active conservation program for Listed Fish Species;
  - 2.2.3** To establish commitments for implementation of each of the terms of the Idaho Forestry Program; and
  - 2.2.4** To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement.

### **3.0 AUTHORITIES**

This Agreement is entered into pursuant to the following authorities:

- 3.1** Endangered Species Act of 1973, as amended (16 U.S.C. §§ 1531-43).
  - 3.1.1** Section 2(c)(2) of the Act, 16 U.S.C. § 1531(c)(2) states that “the policy of Congress is that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species.”
  - 3.1.2** Section 6 of the Act, 16 U.S.C. § 1531, directs the Secretary to cooperate to the maximum extent practicable with the states in carrying out the program authorized by the ESA and authorizes the Secretary to enter into cooperative agreements to assist in the implementation of adequate and active state programs for the conservation of endangered and threatened species.
- 3.2** The Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6301-6308, authorizes the United States to enter into Cooperative Agreements to transfer a thing of value to the State or other recipient to carry out a public purpose of support or stimulation authorized by a federal law. Substantial involvement is expected between the executive agency, herein the U.S. Fish and Wildlife Service, and the state or other recipient when carrying out the activity contemplated in the agreement.
- 3.3** The Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666, states that “wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation.” This Act authorizes the Secretary of the Interior “to provide assistance to, and cooperate with, federal, state, and public or private agencies and organizations in the development, protection, rearing and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same, ... and in carrying out other measures necessary . . . .”

- 3.4** Idaho Code § 67-2328 authorizes state agencies to enter into cooperative agreements with federal agencies for the joint exercise of powers, privileges and authorities, provided such agreement does not purport to extend the jurisdiction, power, privilege or authority such state agency would have if acting alone. Chapter 148, 2005 Idaho Sess. Laws, directs the heads of all state agencies to “execute and perform all actions” that are “necessary to implement” the Snake River Water Rights Agreement of 2004, which includes the Idaho Forestry Program for the Salmon and Clearwater River basins.
- 3.4.1** It is the public policy of the state of Idaho to “encourage forest practices” on “state and private forest lands” to “maintain forest tree species, soil, air and water resources, and [provide] a habitat for wildlife and aquatic life.” Idaho Code § 38-102(1). Accordingly, the Idaho Board of Land Commissioners is vested with “authority to adopt rules designed to assure the continuous growing and harvesting of forest tree species and to protect and maintain the forest soil, air, water resources, wildlife and aquatic habitat.” Idaho Code § 38-102(2). Idaho Code § 38-1305 authorizes the director of the department of lands to administer the Idaho Forest Practices Act on privately-owned forest lands; to “enter into cooperative agreement [sic] or contracts which may be necessary in the administration of this act;” and to “develop methods for controlling watershed impacts resulting from cumulative effects.” The director of the department of lands also administers forestry operations on state endowment lands, which are managed to “secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted.” Idaho Const. art. IX, § 8.
- 3.4.2** The Idaho Department of Fish and Game, overseen by the Idaho Fish and Game Commission, is charged with managing all wild animals, birds and fish so that such are “preserved, protected, perpetuated and managed.” Idaho Code § 36-103. The Commission is authorized to acquire lands and waters for the protection of game and fish, to provide for public participation in determining the conservation status of fish and wildlife, to conduct investigations and research regarding the requirements for conservation of fish and wildlife, and to enter into cooperative agreements with the federal agencies for the protection of fish and wildlife. Idaho Code § 36-104.
- 3.4.3** The Idaho Office of Species Conservation is authorized to coordinate “all state departments and divisions with duties and responsibilities affecting endangered species, threatened species and species petitioned to be listed;” to participate in “regional efforts to cooperatively address endangered species and threatened species;” and to negotiate “agreements with federal agencies concerning endangered species, threatened species and candidate species, including, but not limited to, agreements pursuant to 16 U.S.C. section 1533(d) and 16 U.S.C. section 1539(a), other than those

agreements negotiated pursuant to 16 U.S.C. section 1535.” Idaho Code § 67-818(2).

- 3.5 Snake River Basin Adjudication Mediator’s Term Sheet, Section II.B.2.** The state of Idaho and the United States agreed to implement the Idaho Forestry Program in partial settlement of the water right claims of the Nez Perce Tribe, and further agreed that the terms of the ESA section 6 agreement to be negotiated by the parties would not vary materially from the terms specified in the Mediator’s Term Sheet.
- 3.6 Snake River Water Rights Act of 2004, Section 4, Public Law 108-447, Division J, Title X.** In Section 4 of the Act, the United States Congress ratified the Mediator’s Term Sheet, and Section 2 of the Act directed the “heads of Federal Agencies with obligations under the Agreement [to] execute and perform all actions, consistent with this Act, that are necessary to carry out the Agreement.” Further, Section 9 of the Act established the Salmon and Clearwater River Basins Habitat Fund to be used “for habitat protection and restoration in the Salmon and Clearwater River basins in Idaho, including projects and programs intended to protect and restore listed fish and their habitat in those basins.” The State, the Services, and the Nez Perce Tribe have entered into a Memorandum of Agreement Establishing a Collaboration Process for Making Recommendations to the State of Idaho Concerning Use of the State Section 6 Account of the Snake River Basin Adjudication Agreement of 2004 Habitat Trust Fund.

#### **4.0 DEFINITIONS**

The following terms as used in this Agreement shall have the meanings set forth below:

- 4.1** The term “Agreement” shall mean this document and all appendices thereto.
- 4.2** The term “Listed Fish Species” shall mean threatened or endangered species addressed in the Program Document.
- 4.3** The term “changed circumstances” shall mean changes in circumstances affecting a Listed Fish Species or the Project Area covered by this Agreement that can reasonably be anticipated by the Parties to this Agreement, and that can reasonably be planned for in this Agreement (*e.g.*, a fire or other natural catastrophic event in areas prone to such event) and that is not the result of an enrollee’s activities. Changed circumstances are represented as a range that is sufficiently large that it may have a material impact on stream habitat and covered species, yet not so large as to make them unforeseeable. Changed circumstances and the planned responses to those circumstances are described in section \_\_\_\_ of the Program Document. Changed circumstances are not unforeseen circumstances.
- 4.4** The term “Enrollees” shall mean owners of state and private lands in Idaho who enroll in the Idaho Forestry Program. The limitation of enrollment to land owners does not limit the scope of the incidental take statement, which is anticipated to apply to all persons conducting forestry operations in accordance with the terms of the Idaho Forestry Program.

- 4.5** The term “Idaho Forestry Program” or “Program” as used in this Agreement shall mean the program within the Salmon and Clearwater River basins described in this Agreement and its appendices.
- 4.6** The term “Parties” shall mean the FWS, NOAA Fisheries Service, the Idaho Department of Lands (IDL), the Idaho Department of Fish and Game (IDFG), and the Idaho Office of Species Conservation (OSC).
- 4.7** The term “Program Document” means the document attached as Appendix B to this Agreement.
- 4.8** The term “Project Area” shall mean state and private forest lands within the Clearwater River basin and the Salmon River basin, Idaho.
- 4.9** The term “Services” shall mean the FWS and NOAA Fisheries Service, collectively.
- 4.10** The term “State” shall mean the State of Idaho, acting by and through the Idaho State Board of Land Commissioners, IDL, IDFG, and OSC.
- 4.11** The term “Term Sheet” means the document titled “Mediator’s Term Sheet” dated April 20, 2004, and submitted on that date to the SRBA Court in SRBA Consolidated Subcases 03-10022 and 67-13701, and all appendices to that document.
- 4.12** The term “unforeseen circumstances” shall mean changes in circumstances affecting a species or geographic area covered by this Agreement that could not reasonably have been anticipated by Parties to this Agreement at the time of the Agreement’s negotiation and development, and that result in a substantial and adverse change in the status of the Listed Fish Species. These are circumstances greater than the upper end of the range associated with events that are not anticipated as defined in “changed circumstances” above. Unforeseen circumstances and the plan responses to these circumstances are described in section \_\_\_\_ of the Program Document.

## **5.0 OBLIGATIONS OF THE PARTIES**

- 5.1 Obligations of State.** The State, through its Department of Lands, will establish and operate a voluntary program for implementation of certain forest practices on enrolled State and private forest lands in the Salmon and Clearwater River basins. The specific measures within the Program, including those necessary for the State to ensure that the anticipated conservation benefits are commensurate with the extent of incidental take that is authorized under this Agreement, are set forth in the Program Document. The Program Document will include an adaptive management plan that will allow the State to adjust the measures set forth in the Program Document.
- 5.1.1 Open Enrollment.** There will be open enrollment in the Idaho Forestry Program throughout the term of the program. Incidental take coverage will only cover those activities conducted during the period in which the acres are enrolled.

- 5.1.2 Enrollment Commitments.** Each enrollee will commit to implementation of conservation measures consistent with the terms of the Idaho Forestry Program. Enrollees will be encouraged to schedule hot spot treatments and road upgrades as early as practicable. The goal of the State of Idaho in scheduling enrollee conservation commitments is to continuously achieve conservation benefits commensurate with the extent of incidental take that is authorized under this Agreement.
- 5.1.3 Implementation.** At the individual enrollee level, the State will ensure as a matter of contract that all conservation measures identified in the enrollee agreement are implemented when due.
- 5.1.4 Monitoring.** The State of Idaho, not the Services, will be responsible for the enrollment and monitoring of participant's performance of program measures. If the State determines that a participant is not fulfilling his/her commitments in the enrollee agreement, the State will work with the participant to remedy any implementation issues. The Services will be responsible for determining whether the State's administration of the program as a whole is consistent with the requirements of Section 6.
- 5.1.5 Withdrawal of Enrollees.** An enrollee may withdraw at any time; provided, however, as a condition of withdrawal from the program an enrollee agrees to complete road upgrades (II.B.2.c.ii) and treatment of hot spots (II.B.2.c.ii.(a)ii) within the boundaries of any areas harvested and on roads on enrollee lands used to transport forest products from areas harvested. Upon withdrawal the enrollee also agrees to complete all other actions scheduled to be completed through the time of withdrawal.
- 5.1.6 Removal.** The State reserves the right to remove an enrollee from the program if the State determines the enrollee is not substantially complying with the terms of the implementation schedule.

## **5.2 Obligations of the Services**

- 5.2.1 Annual certification.** The Services shall perform all obligations required of them under this Agreement, and at the programmatic level, the Services will review and determine whether the Idaho Forestry Program, as a whole (State and all private land enrolled acres), constitutes an adequate and active program for the conservation of endangered species and threatened species. This review does not involve an evaluation at the scale of an individual enrollee.
- 5.2.2 Technical assistance.** The Services shall provide technical assistance to the State in developing the Program Document and in implementation of the Idaho Forestry Program.

## **5.3 Obligations of all Parties**

- 5.3.1 Joint Defense.** If any person brings a judicial or administrative action against any party to this Agreement which seeks to vacate,



overturn or limit this Agreement, the biological opinion resulting from consultation on this Agreement, or the EIS accompanying this Agreement, the other parties to this Agreement shall, to the extent allowed by their respective legal authorities, and, pursuant to the free exercise of their discretionary authorities, cooperate in defending the integrity of this Agreement, the biological opinion, or the EIS.

## **6.0 STRUCTURE OF AGREEMENT**

- 6.1 General.** This Agreement is between the Services and the State. In entering into this Agreement, the State is assuming the authority, responsibility, and accountability for implementing and administering the Idaho Forestry Program. The structure of this Agreement requires the Services to interact with the State regarding this Agreement. It is understood that successful implementation of this Agreement and the Idaho Forestry Program will require participation of enrollees. The State will be responsible for, and administer duties associated with, enrollees, including participation and potential disenrollment.
- 6.2 Relation to other documents.**
- 6.2.1** This Agreement is negotiated pursuant to section II.B.2 of the Term Sheet which outlined the provisions of the Idaho Forestry Program and provided that the Section 6 Agreement to be negotiated by the parties would “not vary materially from the following terms, but may explain and define these terms, including establishment of standards relating to subsequent administrative decisions by the Idaho Department of Lands, as mutually agreed by the parties.” This Agreement and the Program Document constitute the Section 6 Agreement anticipated in the Term Sheet and explain and define the terms of the Idaho Forestry Program described in section II.B.2 of the Term Sheet.
- 6.2.2** The Program Document and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the Program Document, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the Program Document shall be interpreted to be complementary to each other.
- 6.2.3** Section II.B.2 of the Term Sheet is intended to be, and by this reference is, incorporated herein. The Idaho Forestry Program will be implemented as defined in the Term Sheet, including its adaptive management provisions. Except as provided in § 5.1 herein, the provisions of the Term Sheet shall govern the implementation of this Agreement and no provision in this Agreement or any other agreement implementing this Agreement shall supercede or be interpreted in a manner contrary to the provisions of the Term Sheet.

## 7.0 TERM AND SCOPE

**7.1 Scope:** This Agreement applies only to forest practices conducted pursuant to the Idaho Forestry Program on voluntarily-enrolled state and private lands in the Clearwater River basin and the Salmon River basin.

**7.2 Initial term.** This Agreement shall become effective when signed by all parties, and shall remain in full force and effect for a period of 30 years or until termination of the Agreement, whichever occurs sooner.

### **7.3 Termination of the Agreement.**

**7.3.1 Termination by the Services.** The Services may terminate the Agreement for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. (*See* 16 U.S.C. § 1535; 50 C.F.R. Part 81; 15 C.F.R. Part 904.)

In the event the Service determines termination is necessary, they shall notify the State of their finding in writing, identifying specifically the basis for the finding. The State shall be given 30 days to respond in writing, and the parties shall meet thereafter to determine if reasonable steps can be taken to resolve the concerns that led to the finding. If the parties are unable to resolve the concern that led to the finding, the parties may employ the dispute resolution process described herein to resolve such concerns. Only after all efforts at dispute resolution are unsuccessful may the Services terminate this Agreement upon 30 days written notice to the State.

### **7.3.2 Termination by the State.**

**7.3.2.1 General.** The State may terminate the Agreement at any time in accordance with the provisions of this section 7.3.

**7.3.2.2 Procedure for termination.** If the State elects to terminate the Agreement before expiration of the full term of the Agreement, the State will provide notice to the Services at least 120 days prior to the planned termination. Such notice will include a status report containing the information that is required to be provided under Section 10.1. The report will also describe the status of the State's compliance with all other terms of the Agreement, and an accounting of federal funds allocated to date pursuant to this Agreement.

**7.4 Extension of the Agreement.** Upon agreement of the Parties and compliance with all applicable laws, the Agreement and Program Document may be extended beyond its initial term under regulations of the Services in force on the date of such extension. If the State desires to extend the Agreement, it will so notify the Services at least one year before the then-current term is scheduled to expire.

**7.5 Listing of Species.** In the event that a species that may be affected by covered activities becomes listed under the ESA, the Services will work

with the State to identify those measures that may be necessary to avoid take of, jeopardy to, or adverse modification of the critical habitat of the newly-listed species as a result of covered activities. The Parties recognize that listing of a new species that may be affected by the Program may require the Services to reinitiate consultation under Section 7(a)(2) of the ESA. Reinitiation of consultation shall not be cause for termination of this Agreement. Actions identified during the consultation as necessary to address any impacts attributed solely to the federal action (i.e., approval of this Agreement) that are adverse to newly-listed species will either be incorporated into the Program Document upon mutual agreement of the Parties or may be cause for termination of the Agreement pursuant to Section 7.2, unless such actions are addressed through other provisions of the ESA.

## **8.0 FUNDING.**

- 8.1 Habitat Fund.** The Idaho Habitat Fund established by Section 9 of the Snake River Water Rights Act of 2004, Public Law 108-447, Division J, Title X, may be used by the State to fund activities under this Agreement, to provide incentives for participation in the Idaho Forestry Program, or to provide incentives for timely completion of particular habitat actions. Specific uses of the Idaho Habitat Fund are governed by the Memorandum of Agreement Between the State of Idaho, the Nez Perce Tribe, the United States Fish and Wildlife Service, and NOAA Fisheries Service Establishing a Collaboration Process for Making Recommendations to the State of Idaho Concerning Use of the State Section 6 Account of the Snake River Basin Adjudication Agreement of 2004 Habitat Trust Fund.

## **9.0 MONITORING AND REPORTING**

- 9.1 Planned annual reports.** As required by Section 6(c) of the ESA and described in the Program Document, the State will submit annual reports for the previous calendar year on or before April 30 of each year, describing its activities and results of the monitoring program provided for in the Program Document. Annual reports will include, at a minimum, the following information summarized by HUC 5 watersheds or finer scale (for Sections 9.1.1 – 9.1.4):
- 9.1.1 Acreages:** The annual report will include total acreage enrolled in the program, the amount of acreage enrolled in the program during the reporting year, maps showing locations of enrolled and disenrolled lands (at 1:125,000 or greater scale), the total acreage disenrolled in the program, and the amount of acreage disenrolled from the program during the reporting year.
  - 9.1.2 Status of Riparian Management:** The annual report will include acreages of enrolled lands harvested in the past reporting year, the status of stream mapping efforts and copy of latest GIS-based data, and a description and status of any research projects. Maps of

locations in which yarding corridors were placed through the no harvest zone will be kept on file by the IDL in the Coeur d'Alene Staff Headquarters Office.

- 9.1.3 Status of Road Management:** The annual report will include the total miles of new road construction and the number of miles of new road construction completed during the current reporting year, the number of culvert installations, the number of culvert replacements, the miles of road upgrades, a list of prioritized road upgrades for next reporting year, and the current version of the road management database.
- 9.1.4 Status of Variance Commitments:** The annual report will include the total number and types of variances granted, and the number and types of variances granted during the reporting year.
- 9.1.5 Status of Implementation Monitoring:** The annual report will describe actions associated with the implementation monitoring plan and disclose whether any changes were made in implementation monitoring plans during the reporting year.
- 9.1.6 Status of Adaptive Management:** The annual report will include a description of any adaptive management activities that occurred during the reporting year.
- 9.1.7 Status of Expenditures:** The annual report will include a list of monies expended, for the purpose of implementing this Agreement, from the Salmon and Clearwater River Basins Habitat Fund, by the State as matching funds, and any in-kind services rendered by the State or agents of the State as match to the federal Habitat Trust Fund expenditures.

## **9.2 Other information.**

- 9.2.1 General.** The State will, within 30 days of being requested by the Services, provide access to the Services at the IDL Coeur d'Alene Staff Headquarters Office to any additional information in its possession or control related to implementation of the Idaho Forestry Program that is requested by the Services for the purpose of making its annual determination that the State has an "adequate and active" program. Such information may include data assessing whether the terms of the Agreement and the Program Document, including the Program Document's adaptive management plan, are being fully implemented.
- 9.2.2 Five-year summaries.** Term Sheet requires that the State provide 5-year reports regarding implementation of the Agreement. It is anticipated that the information provided in the State's annual reports will provide the information expected in the five-year reports and that the five-year reports will provide summaries and/or compilations of the information in the annual reports.

- 9.3 Form of information.** It is the expectation of the Parties that the information provided by the State pursuant to Section 9.1 and 9.2.2 will

aggregate data and will not include information regarding individual Enrollees. Data will be provided as necessary to address species impacts of the Program as a whole and will not identify specific Enrollees or specific lands.

- 9.4 Certification of Idaho Forestry Program for the Salmon and Clearwater River basins.** Provided that all information required by sections 9 and 10 is provided in the timeframe described in Section 9.1, and its content is sufficient, the Services will conduct its annual review, as required by Section 6(c)(1) of the ESA, 16 U.S.C. § 1535(c)(1). In addition, the Services will review the program described in this Agreement, as required by Section 6(e) of the ESA, 16 U.S.C. § 1535(e). The Service will promptly provide the State with a copy of its annual determinations. Before making a determination that the State's program is not adequate and active, the Services will provide the State with 30 days notice and allow for discussion of how to remedy the situation.

## **10.0 CHANGED CIRCUMSTANCES AND UNFORESEEN CIRCUMSTANCES.**

- 10.1 State-initiated response to changed circumstances.** The State will give notice to the Services within fifteen days after learning that any of the changed circumstances listed in Section \_\_\_\_ of the Program Document have occurred. The State will initiate responses to such changed circumstances in the manner described in the Program Document.
- 10.2 Service-initiated response to changed circumstances.** If the Services determine that changed circumstances listed in Section \_\_\_\_ of the Program Document have occurred and that the State has not responded in accordance with Section \_\_\_\_ of the Program Document, the Services will notify the State and request that the State undertake those measures set forth in the Program Document. Within 30 days after receiving such notice, the State will report to the Services on its actions.
- 10.2.1** In the event the State and the Services disagree as to whether an event constitutes a changed circumstance, the parties will employ the dispute resolution procedures of Section 13.3 herein.
- 10.3 Interim obligations upon a finding of unforeseen circumstances.** If unforeseen circumstances arise, the State will work collaboratively with the Services to develop appropriate conservation measures that address concerns related to Listed Fish Species, their habitat, and effects upon them associated with covered activities.

## **11.0 ADAPTIVE MANAGEMENT.**

- 11.1** The Idaho Forestry Program will include measures that will allow the State to monitor for effectiveness of the Program and make any changes to the Program necessary to adapt to new information.

## **12.0 MODIFICATIONS AND AMENDMENTS**

### **12.1 Minor modifications.**

**12.1.1** Any party may propose minor modifications to this Agreement by providing notice to all other parties. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including its effects on operations under the Program Document and on Listed Fish Species. The parties will use best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon all parties' written approval. If, for any reason, a receiving party objects to a proposed modification, it must be processed as an amendment of the Agreement in accordance with subsection 12.2 of this section. The Services will not propose or approve minor modifications to the Program Document or this Agreement if the Services determine that such modifications would result in: (1) operations under the Program Document that are significantly different from those analyzed in connection with the original Program Document, (2) adverse effects on the environment that are new or significantly different from those analyzed in connection with the original Program Document, or (3) additional conservation losses not analyzed in connection with the original Program Document.

**12.1.2** Minor modifications to the Program Document and this Agreement processed pursuant to this subsection may include but are not limited to the following:

**12.1.2.1** Corrections of typographic, grammatical, and similar editing errors that do not change the intended meaning;

**12.1.2.2** Correction of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the Agreement or Program Document; and

**12.1.2.3** Minor changes to survey, monitoring or reporting protocols.

**12.1.3** Any other modifications to this Agreement will be processed as amendments of the Agreement in accordance with subsection 12.2 of this section.

**12.2 Amendment of the Agreement.** The Agreement may be amended by mutual agreement of the Parties in accordance with all applicable legal requirements, including but not limited to the ESA, the National Environmental Policy Act, and the Services' associated regulations. The party proposing the amendment shall provide a statement of the reasons for the amendment and an analysis of its environmental effects, including its effects on operations under the Program Document and on Listed Fish Species.

- 12.3 Amendment of Program Document.** The parties may adopt different procedures for amendment of the Program Document and the appendices thereto. Such procedures will be stated in the Program Document.

### **13.0 REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION**

- 13.1 No monetary damages.** No party shall be liable in damages to any other party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement.
- 13.2 Enforcement authority of the United States.** Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA or other applicable law.
- 13.3 Dispute resolution.** The parties intend that the Program Document include provisions to address disputes concerning interpretation of, implementation of, and compliance with, its provisions. However, the parties recognize that similar disputes may arise about this Agreement. The parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the parties may later agree. However, if at any time any party determines that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolution.
- 13.3.1 Informal dispute resolution process.** Unless the parties agree upon another dispute resolution process, the parties may use the following process to attempt to resolve disputes: the parties will work together in good faith at the appropriate technical, staff or policy level to informally resolve any disputes that arise in the Agreement or the Program Document. If such informal efforts at dispute resolution fail, any party may invoke the following procedure:
- 13.3.1.1** The aggrieved party will notify the other parties of the provision that may have been violated or misconstrued, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.
- 13.3.1.2** The party alleged to be in violation or error will have 30 days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.
- 13.3.1.3** Within 30 days after such response was provided or was due, representatives of the parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all parties, or will establish a specific process and timetable to seek such a solution.

**13.3.1.4** If any issues cannot be resolved through such negotiations, the issue will be presented to a policy-level group consisting of the Director of the Idaho Department of Lands, the Regional Director of the FWS, Region 1, and the Director of the Northwest Regional Office, NOAA Fisheries Service; failing that, the Regional Directors and the Director of IDL will raise the issue for policy discussion to the Offices of the Secretaries of Commerce and the Interior and the Office of the Governor.

**13.3.2** The parties may adopt different procedures for resolution of disputes arising from implementation of measures in the Program Document and the appendices thereto. Such procedures will be stated in the Program Document.

#### **14.0 MISCELLANEOUS PROVISIONS**

**14.1 No partnership.** Neither this Agreement nor the Program Document shall make or be deemed to make any party to this Agreement the agent for or the partner of any other party.

**14.2 Reinitiation of Consultation.** Reinitiation of consultation on the FCRPS Biological Opinion shall not automatically trigger reinitiation of consultation on the Agreement. Consultation on this Agreement may be reinitiated only under the following circumstances:

**14.2.1** To reduce the obligations of the parties in the event the measures in the Idaho Forestry Program are determined to be no longer necessary;

**14.2.2** Pursuant to 50 C.F.R. Section 402.16.

**14.3 Notices.** Any notice permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any party may from time to time specify to the other parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Assistant Regional Director  
United States Fish and Wildlife Service  
911 N.E. 11th Ave.  
Portland, Oregon 97232-4181  
Telephone: 503-231-6159  
Telefax: 503-231-2019

Regional Administrator  
National Marine Fisheries Service



7600 Sand Point Way N.E.  
Seattle, Washington 98115-0070  
Telephone: 206-526-6150  
Telefax: 206-526-6426

Director  
Idaho Department of Lands  
P.O. Box 83720  
Boise, Idaho 83720  
Telephone: 208-334-3700  
Telefax: 208-334-3698

Director  
Idaho Department of Fish and Game  
600 S. Walnut St.  
Boise, Idaho 83712  
Mailing Address:  
P.O. Box 25  
Boise, Idaho 83707  
Telephone: 208-334-5159  
Telefax: 208-334-2148

Administrator  
Idaho Office of Species Conservation  
300 North 6th St., Suite 101  
Boise, Idaho 83702  
Telephone: 208-334-2189  
Telefax: 208-334-2172

- 14.4 Entire agreement.** This Agreement, together with the Appendices, constitutes the entire agreement among the parties. It supersedes any and all other agreements, either oral or in writing, among the parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other party or anyone acting on behalf of any other party that is not embodied herein.
- 14.5 Elected officials not to benefit.** No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.
- 14.6 Availability of funds.** Implementation of this Agreement and the Program Document by the Services is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The parties acknowledge that the Services will not be required under this

Agreement to expend any federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing. Nothing in this Agreement shall obligate the State to expend funds except to the extent explicitly appropriated by the State legislature.

- 14.7 Duplicate originals.** This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the parties hereto.
- 14.8 No third-party beneficiaries.** While the Idaho Forestry Program provides for voluntary participation by private enrollees, and imposes obligations and provides benefits to enrollees, it is not the intent of the Parties that this Agreement shall create any contractual right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the parties to this Agreement with respect to third parties shall remain as imposed under existing law.
- 14.9 Relationship to the ESA and other authorities.** The terms of this Agreement shall be governed by and construed in accordance with the ESA and applicable federal law. In particular, nothing in this Agreement is intended to limit the authority of the Services to seek penalties or otherwise fulfill their responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Services as agencies of the federal government. Nothing in this Agreement will limit the right or obligation of any federal agency to engage in consultation required under Section 7 of the ESA or other federal law; however, it is intended that the rights and obligations of the State and enrollees under the Program Document and this Agreement will be considered in any consultation affecting use of the covered lands by the State and enrollees.
- 14.10 References to regulations.** Any reference in this Agreement or the Program Document to any regulation or rule of the Services shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.
- 14.11 Applicable laws.** All activities undertaken pursuant to this Agreement or the Program Document must be in compliance with all applicable state and federal laws and regulations.
- 14.12 Successors and assigns.** This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the parties and their respective successors and assigns. Assignment or other transfer of the Agreement shall be governed by the Services' regulations; under the regulations in force on the effective date of this Agreement, this Agreement may not be assigned or otherwise transferred.
- 14.13 Consistency with Idaho Forest Practices Act.** All forest practices on State and private lands not explicitly addressed in the Idaho Forestry Program

shall be governed by the Idaho Forest Practices Act and its implementing regulations. Nothing in this Agreement shall be construed as inhibiting the State in its administration of the Idaho Forest Practices Act.

**14.14 No Admission by the State of Idaho.** The State of Idaho is entering into this Agreement on a voluntary and cooperative basis in an effort to contribute to the conservation of threatened and endangered species. Nothing in this Agreement shall constitute an admission by Idaho that previous or future forest practices conducted under the Idaho Forest Practices Act or its implementing regulations have caused or will cause adverse effects to either listed species or their habitats.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Cooperative Agreement as follows:

BY \_\_\_\_\_ Date \_\_\_\_\_  
Regional Director  
United States Fish and Wildlife Service  
Portland, Oregon

BY \_\_\_\_\_ Date \_\_\_\_\_  
Regional Administrator  
National Marine Fisheries Service  
Seattle, Washington

BY \_\_\_\_\_ Date \_\_\_\_\_  
Winston Wiggins, Director  
Idaho Department of Lands

BY \_\_\_\_\_ Date \_\_\_\_\_  
Steven Huffaker, Director  
Idaho Department of Fish and Game

BY \_\_\_\_\_ Date \_\_\_\_\_  
James L. Caswell, Administrator  
Idaho Office of Species Conservation

## **APPENDIX A**

### **Mediator's Term Sheet**

## **APPENDIX B**

### **Idaho Forestry Program for the Salmon and Clearwater River Basins ("Program Document")**